DOCUMENT RESUME

ED 473 007 EC 309 393

TITLE	Determining an Individual Student's Need for Extended School Year Services. Technical Assistance Paper.
INSTITUTION	Florida State Dept. of Education, Tallahassee. Bureau of Instructional Support and Community Services.
REPORT NO	FY-2002-5; TAP-ESE-311202
PUB DATE	2002-01-00
NOTE	18p.
AVAILABLE FROM	Florida State Dept. of Education, Clearinghouse Information Center, Rm. 628 Turlington Bldg., 325 W. Gaines St., Tallahassee, FL 32399-0400. Tel: 850-488-1879; Fax: 850-487-2679; e-mail: cicbiscs@mail.doe.state.fl.us. For full text: http://www.firn.edu/doe/commhome.
PUB TYPE	Guides - Non-Classroom (055)
EDRS PRICE	EDRS Price MF01/PC01 Plus Postage.
DESCRIPTORS	Court Litigation; Delivery Systems; *Disabilities; Educational Finance; Educational Legislation; Elementary Secondary Education; *Eligibility; *Extended School Year; *Individualized Education Programs; Individualized Family Service Plans; Legal Responsibility; School Districts; State Standards; *Summer Schools
IDENTIFIERS	*Florida; Individuals with Disabilities Education Act

ABSTRACT

This paper provides assistance to Florida school districts regarding the development of their extended school year (ESY) policies and procedures for students with disabilities as required under the Individuals with Disabilities Education (IDEA) Act and Florida statutes. Following a brief section providing background information, 27 questions and answers are grouped into the following categories: (1) general (e.g., eligibility for ESY services, district responsibility for students placed in private schools, determination of a need for ESY services, and related services during an ESY period); (2) service delivery models (e.g., the "least restrictive environment" requirement of IDEA and varieties of delivery models); (3) ESY and summer school (e.g., relationship of ESY and summer school and special protections for students with disabilities attending summer school); (4) individualized education program (IEP) or family support plan (FSP) requirements (timing of consideration of ESY services, description of ESY services on the IEP or FSP, and reports to parents); and (5) funding (how ESY services are funded, no cost to parents for educational services, and parent assessment for "recreational" components). An appendix provides an analysis of legal issues including general principles established by the Office of Special Education Programs, key points developed in case law, and application in five Florida cases. (DB)

Reproductions supplied by EDRS are the best that can be made
from the original document.

ED 473 007

Determining an Individual Student's Need for Extended School Year Services
Technical Assistance Paper

Florida State Department of Education
Division of Public Schools and Community Education
Bureau of Instructional Support and Community Services

January 2002

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL HAS BEEN GRANTED BY

A. Duncan

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

1

EC 309393

BEST COPY AVAILABLE

Determining an Individual Student's Need for Extended School Year Services

BACKGROUND

Based on the requirements of the Individuals with Disabilities Education Act (IDEA) and implementing regulations at 34 CFR §300.309, extended school year (ESY) services must be considered by the individual educational plan (IEP) or family support plan team (for children ages three through five years) as part of the provision of a free appropriate public education (FAPE) for students with disabilities. Extended school year services have been identified in case law as individualized instructional services beyond the regular 180-day school year for students with disabilities receiving special education services. ESY is defined in more detail at 34 CFR §300.309(b) as "...special education and related services that- (1) are provided to a child with a disability- (i) beyond the normal school year of the public agency; (ii) in accordance with the child's IEP; and (iii) at no cost to the parent of the child; and (2) meet the standards of the SEA."

Florida's students with disabilities traditionally have been served for extended school year using the summer school model, which was funded on the basis of full-time equivalent (FTE) membership. In 1999-2000, the Legislature's creation of the supplemental academic instructional categorical fund (SAI) gave school districts the flexibility to provide supplemental instruction at any point in the school year to assist students in progressing from grade to grade. These funds are in addition to the funds allocated on the basis of FTE membership in the Florida Education Finance Program (FEFP). As defined at Section 236.08104(2) of the Florida Statutes, these funds may be used for, among other things, "...modified curriculum, reading instruction, after-school instruction, tutoring, mentoring, class size reduction, extended school year, intensive skills development in summer school, and other methods for improving student achievement." Schools are directed to identify the most effective and efficient use of the funds to ensure student progress and may provide the supplemental instruction at any time during or beyond the regular 180-day school term.

The impact of this change in the funding model on the provision of ESY for eligible students with disabilities has been that schools may offer remediation of skills throughout the school year and may choose to no longer offer traditional summer school services. During the 1999-2000 school year, 46 districts indicated that they planned to fund general education summer school and Exceptional Student Education (ESE) ESY with SAI funds (SAI Categorical Fund, Report to the Presiding Officers of the Legislature, February 2000). In contrast, during the following year (2000-2001), 37 districts indicated that they intended to fund summer school for general education students with SAI funds, while 45 intended to fund exceptional student education (ESE) ESY with SAI funds (SAI Categorical Fund, Annual Report, 2000-2001). In addition, between the 1997-1998 and 2000-2001 school years, the average length of a summer school term decreased from 4.6 weeks to 4.2 weeks. This change has created challenges for districts in providing services for eligible students with disabilities in the summer months. The purpose of this technical assistance paper is to provide assistance to districts regarding the development of their ESY policies and

Paper Number: FY 2002-5

January 2002

Division of Public Schools
and Community Education
Bureau of Instructional Support
and Community Services

Refer Questions To:
Kim Komisar (850) 488-1216

FLORIDA
DEPARTMENT
OF EDUCATION

TECHNICAL ASSISTANCE PAPERS are produced periodically by the Bureau of Instructional Support and Community Services to present discussion of current topics. The TA Papers may be used for inservice sessions, technical assistance visits, parent organization meetings, or interdisciplinary discussion groups. Topics are identified by state steering committees, district personnel, and individuals, or from program compliance monitoring.

procedures for students with disabilities. A review of key legal sources which discuss the determination of extended school year services for students with disabilities is included an appendix to this document.

DETERMINATION OF ELIGIBILITY

1. Who is eligible for ESY services?

Potentially, any student with a disability is eligible for ESY services. This includes students currently in Part B programs (ages three through 21), as well as children making the transition from Part C (ages birth to three) to Part B services whose third birthday occurs during the summer and whose individual educational plan (IEP) or family support plan (FSP) specifies a need for ESY services.

2. If eligible Part C children, ages birth through two years, are participating in a school district instructional program funded through FTE, is the school district obligated to offer ESY services to those students?

No. The Part C program does not "conceptualize" services based on an academic school year calendar as does Part B. There are no references in Part C of the IDEA to extended school year. This reference applies only to students ages 3 through 21 who are participating in Part B programs. The underlying assumption is that there would not be a gap of several months during the summer when an eligible infant or toddler with a disability would not be served. Because the ultimate responsibility for ensuring the provision of services for children below the age of three lies with the Part C Infants and Toddlers Early Intervention Program, school districts that elect to offer services to infants and toddlers with disabilities must coordinate services with the Part C Early Intervention Program in order to ensure that the needs of eligible Part C children (birth through age two) are met during the time period when the school district may be unable to provide services. While school districts may be providers of some Part C early intervention services, districts and Part C programs should confer about policies and procedures designed to minimize the impact an interruption in services may have on the child's developmental progress.

3. Must a district provide ESY services to students who have been enrolled in private schools by the district in order to provide FAPE?

Yes, if the IEP or family support plan team determines that ESY services are required in order for that student to receive FAPE, then the district must provide the services. If the private placement does not offer services beyond the 180-day school year, the district must provide the services in some other way. When a student is placed in a private school or agency setting by the district through a contractual agreement as the most appropriate placement for provision of special education and related services, that student retains all the rights of a child with a disability who is served by a public agency (34 CFR §300.401(c)).

4. Must a district provide ESY services to parentally placed private school students?

For students who have been placed in private schools by their parents, the policy is the same as that in place during the school year. There is no individual entitlement to services.

Following the established formula in the IDEA, each district must allot a proportional amount of their federal Part B funds for the provision of services to parentally placed students with disabilities enrolled in private schools. The implementing regulations at 34 CFR §300.454(b)(1) require that the district consult with representatives of private school children with disabilities to discuss the provision of services. The results of this consultation must include:

- ☒ determination of which students will receive services
- ☐ what services will be provided
- ☐ how and where services will be provided
- ☐ how and when services will be evaluated

Services are to be provided in accordance with the decision made by the district and the private schools. A district may choose to provide ESY to some parentally placed private school students, but there is no obligation to do so.

For students attending private schools under the McKay Scholarships for Students with Disabilities Program, the situation is somewhat different. For these students, the private school receives all of the funding generated through the FEFP, and thus incurs all responsibility for providing appropriate educational services, including any service beyond the 180-day school year.

5. How is the need for ESY services determined for students with disabilities?

Determination of the need for ESY services is an IEP or family support plan team decision designed to ensure the provision of FAPE. The need for ESY services must be determined for every student with a disability, every year. If need is demonstrated in the area of academic skills (or, for pre-K students, developmentally appropriate preacademic skills), communication, independent functioning and self-sufficiency, and/or social/emotional or behavioral skills, as they relate to critical life functions, special education or related services may be required. ESY is not intended to provide education beyond that which has been determined necessary by the IEP or family support plan team to ensure FAPE. In many cases, not all of the services specified in an individual student's IEP or FSP for the 180-day school year need to be provided as part of ESY services. Parental requests for ESY services must be considered. However, if ESY services are requested by the parent but the IEP or family support plan team does not see the provision of the requested ESY services as necessary for the provision of FAPE, then a written informed notice of refusal must be provided.

6. How is FAPE defined in reference to ESY services?

There is no special definition of FAPE in reference to ESY. However, FAPE is defined at 34 CFR §300.13 as: "...special education and related services that-

(a) have been provided at public expense, under public supervision and direction, and without charge;
(b) meet the standards of the SEA, including the requirements of this part;
(c) include an appropriate preschool, elementary, or secondary school education in the State; and
(d) are provided in conformity with an individualized education program (IEP) that meets the requirements of §§300.340-300.350."

The implementing regulations at 34 CFR §300.121(a) require that each state have in effect "...a policy that ensures that all children with disabilities aged 3 through 21 residing in the State have the right to FAPE." FAPE requires the provision of special education and related services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP or FSP. An important addition to the reauthorization of IDEA in 1997 included the provision that FAPE "...be made available to any individual child with a disability who needs special education and related services, even though the child is advancing from grade to grade" (34 CFR §300.121(c)).

When considering an individual child's need for ESY services, the IEP or family support plan team must remember that the question is not whether FAPE is being provided in the summer, but rather whether ESY services are necessary in order for the child to receive FAPE.

7. What criteria should be used in determining ESY services?

No single criterion has been identified as the determining factor for ESY services. Decisions of eligibility for ESY services remain an IEP or family support plan team decision, and cannot be limited by use of a formula or single measure. Criteria that can be used to determine whether a student is eligible for ESY services include, but are not limited to

- ☐ regression/recoupment
- ☐ critical point of instruction
- ☐ emerging skills
- ☐ nature or severity of disability
- ☐ interfering behaviors
- ☐ rate of progress
- ☐ special circumstances (e.g., transition from school to work)

It is important that a variety of criteria or factors be considered, in order to ensure provision of FAPE. For example, it would be inappropriate to rely on "regression/recoupment" data to make a determination of need for a pre-K student, while discussion of "interfering behaviors" or "emerging skills" might be significant for that child.

The consideration of both formal and informal evaluations, as well as documentation of individual student performance, are valuable in assisting an IEP or family support plan team in determining need and extent of ESY services for a student.

Eligibility for ESY services and/or the duration of services cannot be limited based on the type or the degree of disability. The fact that a student has made progress toward annual goals or has met annual goals during the school year also does not exclude a student from receiving ESY services.

8. What criteria are inappropriate for determining ESY services?

ESY services are required for those students with disabilities who require these services in order for FAPE to be provided. ESY is **not**

- ☐ child care
- ☐ respite care
- ☐ intended to maximize educational opportunity or potential growth
- ☐ based on specific area of disability, level of service, or type of classroom placement
- ☐ "one size fits all"
- ☐ a longer school day

9. Are there federal definitions of criteria for the terms "regression" and "recoupment"?

No. According to the comments and discussion of 34 CFR §300.309, as well as legal decisions in various parts of the country, the definition of the terms "regression" and "recoupment" is at the discretion of state education agencies. Over a period of 20 years, case law has indicated that regression refers to a decline in knowledge and skills that can result from an interruption in education. Recoupment is the amount of time it takes to regain the prior level of functioning. Since all students are expected to experience some regression during instructional breaks, it is up to the IEP or family support plan team to make a determination regarding what should be considered a reasonable period of recoupment. School districts are encouraged to set criteria for teams to consider as a guide, but the final decision for ESY services is made by the team based on the individual needs of the student. The issue for consideration becomes one that is related to the benefits that the student has gained from his or her IEP or FSP written for the school year, and whether those benefits (student progress) may be jeopardized if the student is not provided with ESY services during breaks in school sessions.

10. Does the IDEA include specific questions that must be addressed when considering a student's need for ESY services?

No. The IDEA and its implementing regulations do not specify questions that must be addressed, only that ESY services are indicated when provision of FAPE is in jeopardy. There is also no quantifiable standard in statute or

case law that is applicable to all students. It is ultimately a team decision based on the specific needs of an individual student and on the likelihood of that student receiving FAPE in the absence of such services.

A review of the current policies and procedures in other states revealed the use of the following focused questions for determining the need for ESY services:

- ☐ Does the student demonstrate a severe disability in one or more areas?
- ☐ Does the student experience significant regression, more pronounced than that experienced by nondisabled peers, in social or adaptive behaviors or learned skills over regularly scheduled school breaks during the year?
- ☐ Is a significant amount of time and effort, beyond that required by nondisabled peers, needed to assist the student in regaining previously learned behaviors and skills?
- ☐ If there is no documented history of regression/recoupment problems from prior breaks in instruction, does predictive data based on the opinion of professionals indicate that a serious potential for regression exists?
- ☐ Is the student failing to achieve instructional goals and benchmarks or short-term objectives on the IEP or FSP due to the interruption of instruction between school years?
- ☐ Is the student at a critical stage in development where the window of opportunity will be lost if the student does not receive services?
- ☐ Does the targeted skill represent a barrier to continuous progress or self-sufficiency?
- ☐ Would the benefits derived from extended educational services outweigh the positive benefits of a summer break?
- ☐ Have other options that would meet the needs of the student been considered and determined to be of less benefit than extended school year services?
- ☐ Is continuous or year-round treatment an integral part of the methodology deemed necessary for the student?
- ☐ Are there unusual circumstances that create a need for extended school year services?
- ☐ Without ESY services in the identified critical life skills, will the student be unable to receive some reasonable level of benefit from his/her educational services during the regular school year?

11. Are related services and transportation to be considered along with special education services when determining need for ESY services ?

Yes. The U.S. Department of Education, Office of Special Education Programs (OSEP), has stated the following in regards to the obligation of school districts to provide related services including transportation and therapy services to students who are in need of and receiving such services during the school year: "...to the extent that the extended placement differs from the regular school placement, the need for related services may also differ in the extended school year placement" (Letter to Baugh, 1987). The IEP or family support plan team is to consider all the needs of the student when determining need for ESY services. If a student requires transportation to benefit from ESY services, then transportation must be provided.

12. Is it possible for a student to receive only related service(s) during the ESY period?

Yes. The purpose of ESY services is to ensure the provision of FAPE. The IEP or family support plan team reviews the student's progress on the IEP or FSP as a whole, utilizing a variety of criteria. Special education, related services, or both, may be deemed necessary. The determination of what related services are necessary is based on the IEP or family support plan team's determination of what is needed to assist the child to benefit from the special education being provided during the entire year. In some cases, related services may be provided without special education services for the ESY period. Examples include the provision of physical therapy to prevent substantial regression of motor skills, or orientation and mobility services in home, school, or community settings. See Letter to Baugh, 211 IDELR 481 (OSERS, August 12, 1987).

SERVICE DELIVERY MODELS

13. How does the least restrictive environment (LRE) requirement of IDEA apply to ESY services?

ESY services, like all other special education services, must be provided in the least restrictive environment in which the IEP or FSP can be implemented. The federal regulations comments section referencing 34 CFR §300.309 states that "...public agencies are not required to create new programs as a means of providing ESY services to students in integrated settings if the public agency does not provide services at that time for its nondisabled children." A district is not required to create a program for the sole reason of providing LRE; however, it may be necessary to provide services in alternative settings if the most appropriate setting determined by the IEP or family support plan team is not available within the existing program offerings.

The LRE for the duration of a student's ESY services may differ from the LRE for the duration of the portion of the IEP or FSP in effect during the traditional school year. Not all goals from the current year are automatically carried over for ESY services. The IEP or family support plan team targets specific goals to be addressed, and the LRE determination must be based on the most appropriate setting in which to address those goals. Because of this, the placement needed to implement the student's ESY IEP or FSP may differ from the regular school year placement.

14. Is there more than one type of service delivery model that can be considered?

Yes. IEP and family support plan teams should determine the appropriate service delivery model based on the needs of the individual student. However, school districts are not required to create new programs merely in order to provide ESY services in integrated settings if they do not provide services at that time for non-disabled children. Some common delivery models include the following:

- ☐ "take-home" instructional materials
- ☐ behavioral or other training for parents or program staff
- ☐ itinerant teacher services
- ☐ consultation
- ☐ tutorials
- ☐ services contracted through community or outside agencies

15. Should the need for ESY services be considered for the period of time before and after the school district's traditional summer school session?

Yes. Federal regulations at 34 CFR §300.309(a)(3) state that, "an LEA...may not unilaterally limit the type, amount, or duration of [ESY] services." OSEP has issued a policy letter stating that limiting the duration of summer services for students with disabilities "...would violate the basic requirement that programs be designed to meet the individual needs of each child" (Letter to Baugh, 1987). Any predetermination or set policy on the

amount of time ESY will be provided is contrary to the regulations. Individual determinations of the number of weeks, days per week, and minutes per day should be based on each student's unique needs. If the IEP or family support plan team determines that the student needs services beyond the school district's established 180-day school year, then a plan should be developed to provide the needed services. The comments section referencing 34 CFR §300.309 states that "there is nothing in the definition of ESY services ...that would limit the ability of a public agency to provide ESY services to a student with a disability during times other than the summer, when school is not in session." This may include services beyond summer school periods or even breaks shorter than summer, if evidence suggests that this is necessary. The IEP or family support plan team should determine the content and time period of the ESY services, based on individual student need.

ESY AND SUMMER SCHOOL

16. How are summer school and ESY related?

In our state, traditional summer school historically has been the primary service delivery model for the provision of ESY services. Over the past few years, with the creation of the SAI categorical fund, districts have decreased or, in some cases, eliminated the provision of traditional summer school. In most districts, only students who meet specific eligibility requirements may attend summer school, if classes are offered. In contrast, ESY services are determined on an individual basis by the IEP or family support plan team. While students with disabilities may attend summer school, may receive ESY services, or may participate in neither, it should be clear that summer school and ESY are substantially different, with correspondingly different eligibility and documentation requirements.

17. If a student who receives special education during the school year needs to receive ESY in the summer, is this considered summer school?

No. If an IEP or family support plan team determines that a student requires special education or related services beyond the traditional 180-day school year in order to receive FAPE, those services are, by definition, considered extended school year services. These special education and/or related services provided during the summer period would be documented as ESY services on the IEP or FSP. "Summer school" may be the service delivery model chosen.

18. If a student with a disability attends summer school (not ESY), either by choice or through other eligibility requirements, are any special provisions required?

Yes. Students with disabilities are protected both under IDEA and under Section 504 of the Rehabilitation Act of 1973. This protection is not limited to the time a student directly receives the special education and related services stated on the IEP or FSP. Accommodations noted on the IEP are intended to ensure that the student be involved and progress in the general curriculum, as well as extracurricular and nonacademic activities (34 CFR §300.347).

19. How must the accommodations be documented for the period of time in which the IEP is not in effect?

The initiation and duration dates of all of the supports, services, modifications, and accommodations to be provided to a student must be documented on the IEP. For a student who receives accommodations, that time period includes any time the student is engaged in school activities, including attendance at a summer school program that is not a part of the IEP. For districts using a year-long IEP (initiation and duration dates spanning a full 365 days), a statement indicating that "These accommodations are to be in effect whenever the student is engaged in school activities" would suffice. If the initiation and duration dates on the IEP do not include the period in question, then initiation and duration dates for the accommodations would have to be provided, to include the summer program.

20. May a district choose to offer "ESE summer school" for students with disabilities who may benefit from the program but who do not meet the district's eligibility criterion for ESY services? If so, how would those services be documented?

Yes. Sometimes summer school programs are open and available to all students enrolled at a school, including students with disabilities. In this circumstance, when the IEP or family support plan team has determined that ESY is not a need for the student, then the appropriate program accommodations would be documented as in question number 18 on page 7.

IEP or FSP REQUIREMENTS

21. When during the year should ESY services be considered?

The IEP or family support plan team decision to provide ESY services may be made at any point during the year. While ESY should be considered as part of the IEP or FSP review process at any IEP or FSP meeting held during the year, ESY needs must be considered minimally during one IEP or FSP meeting during the school year. The district is responsible for documenting consideration and discussion of ESY services at IEP or FSP meetings and should ensure that parents have received information regarding the services suggested for the student, if it is determined that ESY services are necessary.

The federal regulations comments section referencing 34 CFR §300.309 states that public agencies should make determination of need in a timely manner so that a student with a disability who requires ESY services in order to receive FAPE can obtain the necessary services. An eligibility determination would be considered timely if there were sufficient time for the parent to appeal a denial of ESY services before the break in services occurs. The process for such an appeal is described in the *Procedural Safeguards Notice* provided to parents. Districts will also need to plan in a timely manner in order to ensure adequate funds are available to provide ESY services.

In considering the need for ESY services, the IEP or family support plan team may decide to postpone a decision until a later date. In such circumstances, the district should ensure that the team reconvenes within a timely manner, as above.

22. How are ESY services to be described on the IEP or FSP?

ESY services need to be described in such a manner that all parties to the IEP or FSP process are clear about the services to be provided. Although it is not necessary to complete a new IEP or FSP form for ESY services, it is necessary to document the goals and benchmarks or short term objectives to be addressed during ESY services, including the type, amount, frequency, location, and initiation and duration dates of such services. "Location" for the purposes of documentation on an IEP or FSP means the type of setting in which services will be delivered (e.g., physical therapy suite, job site in the community, ESE classroom).

23. Must separate IEP or FSP goals, including benchmarks or short term objectives, other than those from the regular school year be developed for ESY?

No. However, the goals for ESY services should be specific to the needs of the student during that period when services are to be provided. It may be that not all goals and short term objectives or benchmarks from the regular school year are pertinent for the individual student's ESY needs; this should be evident on the IEP or FSP. It is not anticipated that domain areas or related services that were not previously addressed on the student's IEP or FSP would be identified for ESY services. Typically, the goals, including benchmarks and short term objectives, addressed through ESY services will be an extension of those on the current-year IEP or FSP. In some instances, however, new goals may be necessary to ensure that appropriate services are provided during the ESY period.

24. Are additional reports to parents on progress during the duration of services for ESY required?

Reports to parents of students with disabilities must be provided at least as often as such reports are provided to parents of nondisabled students, as required by 34 CFR §300.347(a)(7)(ii). Therefore, if ESY services are being delivered through a summer school model and nondisabled students attending summer school receive progress reports, then students receiving ESY services at this time would do so as well. In circumstances when a progress report is not required, a district may choose to provide information on the student's progress to parents for use in future IEP or family support plan team decisions concerning ESY.

FUNDING

25. How are ESY services funded?

ESY services can be funded through the use of SAI categorical funds (originally ESE students generated weighted FTE (WFTE) in the FEFP for services beyond 180 days). The appropriation for SAI is adjusted annually by the Legislature. Additionally, districts may choose to allocate part of their IDEA, Part B, funds for ESY services. For students turning three during the summer and transitioning from Part C to Part B program, federal IDEA, Part B, preschool funds may be used.

26. Can parents be assessed a fee for ESY services?

No. ESY services are provided in order that the student receive a free appropriate public education. Therefore, ESY services, including required special education and related services such as occupational therapy, physical therapy, or transportation, must be provided at no cost to the parent.

27. If a district elects to provide ESY services in a "nontraditional" setting such as a community recreation program, can a parent be assessed a fee for the "recreational component" of the program?

Yes. The district would need to ensure that the provision of the ESY services was at no cost to the parent. Consequently, costs associated with specialized instruction and related services (including transportation) would be the obligation of the district. The parent could be assessed a fee for the "recreational portion" of the program that is not required for provision of FAPE, consistent with the fee charged to the parent of any child in the program.

However, a district would have to exercise caution that other service delivery options to provide ESY services are available for those parents who are unable or unwilling to assume the costs of the recreational program.

APPENDIX

AN ANALYSIS OF LEGAL ISSUES

This survey addresses the key legal sources that discuss extended school year (ESY) determinations. The analysis is derived from the following three sources: OSEP's published policy interpretations on the current regulations and their judicially-created precursors; the leading federal circuit court cases; and, DOAH's final orders in due process cases. The first section focuses on the general principles established by OSEP. The second section provides the key points developed in the pivotal case law. The final section explains how Florida's Administrative Law Judges (ALJ) have applied this body of law to the facts in five specific cases that involved ESY issues. While there have been almost six hundred rulings involving the provision of ESY services, the scope of this paper has been limited to focus on the issues and cases that most directly address questions relating to policies and procedures regarding ESY services.

OSEP: STATE POLICY FLEXIBILITY WITHIN OSEP/JUDICIAL PARAMETERS

As stated by OSEP on pages 12575-76 of Number 48 of Volume 64 of the Federal Register published on March 12, 1999 (hereinafter referred to as, "OSEP's discussion"), the new ESY regulations contained in Section 300.309 of Title 24 of the Code of Federal Regulations did not "create new legal standards," instead they "codif[ied] well-established case law in this area" and "reflect[ed] the longstanding interpretation of the IDEA by the courts and the [federal] Department [of Education]." Consistent with such prior rulings as Letter to Anonymous, 22 IDELR 980 (OSERS, March 24, 1995), OSEP's discussion emphasizes that the new regulations continue to allow states the flexibility to establish their own standards for an IEP Team's use when making individualized determinations as to whether a child with a disability requires ESY services. This section presents an overview of the principles that have been developed by the federal DOE in its long-standing interpretation and OSEP's discussion of the new regulations. These principles are summarized below.

Individualized Determination

A child's need for ESY is a FAPE determination that must be made on an individualized basis; therefore, any pre-determinations as to a child's eligibility for or the services available via an ESY program are contrary to law. This principle has been applied in several ways. First, this means that ESY may not be limited to children with particular categories of disability. See also Letter to Baugh, 211 IDELR 481 (OSERS, August 12, 1987). Second, ESY may not be limited only to children who require a particular modality, such as a structured learning environment. See also Letter to Libous, 17 IDELR 419 (OSERS, November 15, 1990). Third, ESY may not be limited only to children who require services for a particular amount of time. See also Letter to Libous, 17 IDELR 419 (OSERS, November 15, 1990). Fourth, the duration of the ESY services may not be pre-determined. Last, even the time period during which ESY may be offered may not be restricted. Specifically, in its discussion, OSEP states that ESY is not explicitly limited to the summer months; rather, it could include any times outside the regular school year when a child requires additional services.

IEP Procedural Requirements

ESY determinations must be made in accordance with the regular school year's IEP procedures. This means that any determinations regarding services should be made during IEP Team meetings by the IEP Team and documented on an IEP. However, the IEP Team can initially determine that further evaluations are needed before the IEP Team can make that decision. See also Letter to Baugh, 211 IDELR 481 (OSERS, August 12, 1987). Any changes to the amount of services provided must also be made in an IEP Team meeting. See also Letter to Harkin, 213 IDELR 263 (OSERS, September 15, 1989). The specific amount and type of special education and related services to be provided must be stated in the IEP. The amount of time to be committed to each of the services must be stated in the IEP to be sufficiently clear to all who are involved in the IEP's development and implementation. See also Letter to Gregory, 17 IDELR 1180 (OSEP, March 20, 1991).

Analysis for Determinations

OSEP continues to focus on the prevalent regression/recoupment analysis in wide use over the last decade. For example, OSEP has stated in Letter to Myers, 213 IDELR 255 (OSEP, August 30, 1989) that, in the absence of specific federal guidelines, most states have required ESY to address regression and recoupment problems. However, OSEP has indicated that all ESY determinations must be made on an individualized basis, including what would constitute recoupment. See also Letter to Gregory, 17 IDELR 1180 (OSEP, March 20, 1991).

The most detailed presentation of OSEP's recommendations for this analysis appears in Letter to Anonymous, 22 IDELR 980 (OSERS, March 24, 1995). In that published letter, OSEP attempted to provide a more specific analysis of the prevalent procedures that focus on whether there is sufficient evidence to indicate regression and slow recoupment without summer programming. Essentially, the evidence must be examined on a case-by-case basis in light of each child's individual needs. Relying on Johnson, discussed further below, as an example of an appropriately individualized analysis, OSEP specified that the data that could be considered to determine whether the child's level of achievement would be jeopardized by a summer break may include: 1) retrospective data, such as past regression and rate of recoupment; 2) predictive data provided by professionals in consultation with the child's parents; and/or 3) predictive data based on circumstantial considerations of the child's situation at home and in his neighborhood or community.

OSEP has also indicated that over-simplified determinations are not appropriate. For example, in Letter to Baugh, 211 IDELR 481 (OSERS, August 12, 1987), OSEP indicated that just because ESY was or was not provided in a prior year doesn't inevitably indicate what is appropriate for the current year. Also, OSEP has stated that federal law does not mandate ESY if a child does not meet the IEP's goals. See also Letter to Kleczka, 30 IDELR 270 (OSEP, September 29, 1998).

Services Offered

The services offered via ESY may be different from those offered during the regular school year. For example, a regular IEP may reasonably be designed to focus on areas that the child may regress in, OR non-academic skills or programs that the child needs to avoid regression in academics. See also Letter to Myers, 213 IDELR 255 (OSEP, August 30, 1989). Also, a child may only require related services to meet the FAPE standard. The determination as to what related services are necessary is based on the IEP Team's determination of what is needed to assist the child to benefit from the special education being provided; and, thus, should be the same analysis that is used for the special education services determination. Related services, such as transportation, must be provided if they are necessary for the provision of ESY services. See also Letter to Baugh, 211 IDELR 481 (OSERS, August 12, 1987).

Least Restrictive Environment

In its discussion of the ESY requirement for providing the least restrictive environment ("LRE"), OSEP is consistent with its previous rulings, such as in Letter to Myers, 213 IDELR 255 (OSEP, August 30, 1989). The LRE requirement must be met for ESY, although the LRE for the duration of ESY services may differ from that during the school year. The LRE for the duration of an individual student's ESY services is based on the goals and objectives to be addressed during that period of time. Districts do not have to establish public programs for non-disabled children solely to implement the LRE provision. But, if a child's IEP for the extended school year period requires interaction with non-disabled children, then the district must develop alternative means for meeting that requirement, including private placements. OSEP's discussion indicates that this also could include noneducational settings.

Continuum of Placements

OSEP's discussion of this ESY requirement is also consistent with its previous rulings, such as in Letter to Myers, 213 IDELR 255 (OSEP, August 30, 1989). Although the full continuum of alternative placements is not federally mandated, single-placement options, such as a center-based program, may have to be modified or alternatives found, if that is necessary to implement a child's IEP.

Transitioning of Children at Age Three

OSEP's discussion continues to focus on the unique ESY situation that must be addressed for children who turn three in the summer. As stated in such prior rulings as Letter to Ash, 18 IDELR 786 (OSEP, March 19, 1992), OSEP continues to emphasize that children who are eligible for special education and related services must have a transition IEP or IFSP developed and implemented by their third birthday, so that a child who reaches age 3 during the summer must receive ESY services prior to the school year if the IEP Team has determined a need for them. If ESY is not needed, then the initiation of services can begin with the school year. Historically, as stated in OSEP Memorandum 14, 19 IDELR 1130 (April 1, 1993), states have funding flexibility when it comes to providing FAPE to 3-year-old children during the summer, specifically ESY as determined by the IEP Team and specified on the IEP or IFSP.

Timelines

Although OSEP's discussion indicates that there is no specific timeline when an ESY determination must be made, OSEP has made it clear that ESY determinations must be made sufficiently in advance to ensure that the necessary services are provided in a timely manner. In such rulings as OSEP Memorandum 14, 19 IDELR 1130 (April 1, 1993), OSEP has applied this principle specifically to children who turn three in the summer, emphasizing that districts must ensure that the necessary personnel are available and that a meeting is held sufficiently in advance for the development of such a transition IEP or IFSP.

Procedural Safeguards

OSEP's discussion continues its emphasis on the key point that ESY is a FAPE determination for which all of the usual procedural safeguards apply. As such, ESY matters are already included within the written notice requirements. Also, this means that disagreements regarding ESY constitute a FAPE issue which is resolvable via due process and other IDEA requirements, including state complaint procedures. See also Letter to Anonymous, 22 IDELR 980 (OSERS, March 24, 1995), and Letter to Ash, 18 IDELR 786 (OSEP, March 19, 1992). Therefore, a district cannot restrict the time in which a parent can file a challenge to the IEP Team's ESY determination. See also Letter to Harkin, 213 IDELR 263 (OSERS, September 15, 1989)(no 15-day deadline). Also, all requirements for accessing alternative dispute resolution procedures must be consistent with a parent's rights to request a due process hearing and receive one without delay. See also Letter to Harkin, 213 IDELR 263 (OSERS, September 15, 1989).

Private School Children

OSEP's discussion continues to explain that the procedures for ESY determinations for parentally-placed private school students are the same as those for the provision of other special education and related services for such children. Additionally, in such prior rulings as Letter to Skiba, 18 IDELR 592 (OSERS, December 16, 1991), OSEP has indicated that children who are publicly placed in a private school are entitled to the same ESY procedures as children who are enrolled in public schools. Therefore, if the private school does not provide the requisite ESY services, then the district must find an appropriate program to ensure the provision of FAPE.

Free

OSEP continues to require that ESY services must be provided at no cost to the parent. See also Letter to Kleczka, 30 IDELR 270 (OSEP, September 29, 1998).

JUDICIAL RULINGS: THE LEADING CASES

Georgia Association of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983), vacated and remanded on other grounds, 468 U.S. 1213 (1984), on remand, 740 F.2d 902 (11th Cir. 1984), cert. denied, 469 U.S. 1228 (1985) is a landmark case which initially established the ESY requirement that was later incorporated into the amended IDEA and its implementing regulations. However, this case did not provide specific guidance as to how that requirement should be implemented. Providing such specific guidance is Johnson v. Independent School District No. 4 of Bixby, 921 F.2d 1022 (10th Cir. 1990), cert. denied, 500 U.S. 905 (1991), the leading case which has incorporated the principles developed throughout the country into the broad-based analytical approach cited with approval by U.S. DOE for the last decade and in OSEP's discussion of the new ESY regulations. In the Johnson case, the court stated the following key points, many of which were derived directly from other courts' prior rulings (citations omitted):

Integral Regression-Recoupment Analysis

"The amount of regression suffered by a child during the summer months, considered together with the amount of time required to recoup those lost skills when school resumes in the fall, is an important consideration in assessing an individual child's need for continuation of his or her structured educational program in the summer months." 921 F.2d at 1027.

Benefit Standard Applicable

"The some-educational-benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought 'to a virtual standstill.' Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services. The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months." 921 F.2d at 1027.

Multi-Factored Analysis

"However, the regression-recoupment analysis is not the only measure used to determine the necessity of structured summer program. In addition to degree of regression and the time necessary for recoupment, courts have considered many factors important in their discussions of what constitutes an 'appropriate' educational program under the Act. These include the degree of impairment and the ability of the child's parents to provide the educational structure at home...; the child's rate of progress, his or her behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with non-handicapped children, the areas of the child's curriculum

which need continuous attention, and the child's vocational needs...; and whether the requested service is 'extraordinary' to the child's condition, as opposed to an integral part of a program for those with the child's condition. [citations omitted]." 921 F.2d at 1027.

Consideration of Predictive Data

"The analysis of whether the child's level of achievement would be jeopardized by a summer break in his or her structured educational programming should proceed by applying not only retrospective data, such as past regression and rate of recoupment, but also should include predictive data, based on the opinion of professionals in consultation with the child's parents as well as circumstantial considerations of the child's individual situation at home and in his or her neighborhood and community. [citations and footnotes omitted]." 921 F.2d at 1028.

Applicability of Rowley

The three essential principles of Rowley continue to be applicable to ESY determinations. First, children must receive the "floor"-level of services necessary to attain the requisite level of benefit, not the "ceiling." Second, individualized services must be provided. And, third, parents retain the right and obligation to act as the enforcement arm of the entitlement through the procedural safeguards. 921 F.2d at 1029.

Past Regression Not Determinative

"To the extent that the Oklahoma statute has been interpreted to require the party attacking the child's proposed IEP to prove that the child has already experienced significant regression with ineffective recoupment of educational or basic life skills, or could be predicted to experience such regression during summer months, in isolation from any other elements which may be important to an individualized assessment of the child's situation, the Oklahoma statute is actually more restrictive than the federal entitlement, rather than more expansive. We cannot reconcile that interpretation with the individualized review demanded by the Act. As an example which is not uncommon, what of the child who has not shown regression in the past, but for whom other factors, such as acceleration of his or her deficiencies with increased physical maturity, outweigh the lack of past egregious regression? Under the Act, both documentation concerning past regression and predictions of future regression should be considered, an analysis which requires investigation into many aspects of the child's educational, home, and community life." 921 F.2d at 1030.

Additional Factors

"The list of possible factors includes the degree of impairment, the degree of regression suffered by the child, the recovery time from this regression, the ability of the child's parents to provide the educational structure at home, the child's rate of progress, the child's behavioral and physical problems, the availability of alternative resources, the ability of the child to interact with nonhandicapped children, the areas of the child's curriculum which need continuous attention, the child's vocational needs, and whether the requested service is extraordinary for the child's condition, as opposed to an integral part of a program for those with the child's condition. This list is not intended to be exhaustive, nor is it intended that each element would impact planning for each child's IEP." 921 F.2d at note 9 on p. 1030.

DIVISION OF ADMINISTRATIVE HEARINGS (DOAH) RULINGS

The State of Florida's Administrative Law Judges have issued final orders in almost a half a dozen due process hearing cases which show how legal challenges to ESY determinations have been analyzed and resolved over the last decade. This section presents the highlights from those orders, each involving a different county within the State of Florida.

Charlotte County

The ALJ identified the following on page 17 of Z.H. v. Charlotte County School Board, DOAH Case No. 00-2715E (ALJ Johnston, August 9, 2000) as the factors to be used for ESY determinations: 1) "the likelihood of regression;" 2) "slow recoupment;" and 3) "predictive data based on the opinion of professionals." The ALJ added that, "Students are not eligible for ESY services if they do not regress during breaks from school." In this particular case, the ALJ had concluded on page 17 that the evidence was insufficient to establish a need for ESY services. This conclusion was based on the consistent factual findings on pages 10 and 13 that, for this SLD child with dyslexia, "there was no evidence of out-of-the-ordinary regression or slow recoupment after school breaks," that the child's progress was "almost on grade level" and "steady," and that "since no ESE services have yet been provided...it is difficult to predict how [the child] will react to breaks in delivery of ESE services after they are begun." As discussed on page 10, it appeared that the IEP Team had made an individualized determination with a consideration of the appropriate factors; and, that contrary to the parent's assertions, the cancellation of summer school had not affected the availability of ESY services.

Indian River County

The ALJ addressed three ESY questions in B.B. v. Indian River County School Board, DOAH Case No. 99-2496E (ALJ Kirkland, December 20, 1999): 1) what is the appropriate FAPE standard for summer programming?; 2) does the enforcement of the stay-put rule result in a different standard?; and, 3) are parents who chose to home-school their child during the summer entitled to reimbursement for the resulting expenses? As to the first question, on page 11, the ALJ quoted the standard developed by the court in Johnson, 921 F.2d at 1028, as follows: "'whether the benefits accrued to the child during the regular school year will be significantly jeopardized during the summer months.'" In this case on the same page, the ALJ concluded that "the IEP...would have prevented regression during the summer months and would have provided [the child] with a free appropriate public education." On page 11, the ALJ rejected the parents' request that a higher standard apply, specifically "that the programming be the same as would be used during the regular school year and would be aimed at learning new skills rather than maintaining the skills learned during the regular school year."

As to the second question, the ALJ first explained on page 6 that, "The services do not necessarily have to be provided by the same teachers as B.B. had during the regular school year nor do they have to be provided at the same school, but the services have to be the same. (citations omitted)." However, on page 12, the ALJ concluded that, even though the types of services had to be the same, the amount of services could be different, so long as the services offered would fulfill the "purpose of the summer session," which is "to prevent regression." In this specific case, "the question [was] whether the provision of an autistic classroom for four days a week rather than five violates the stay-put provision of IDEA." She concluded that four days was sufficient to meet the ESY standard for FAPE; therefore, it would comport with the stay-put standard.

As to the third question, the ALJ treated the parents' decision to home-school their child as a unilateral placement subject to the two-part test of Florence County School District Four v. Carter, 114 S.Ct. 361, 366 (1993). As to the first prong, the ALJ concluded on page 13 that the IEP and proposed placement constituted an offer of FAPE. As to the second prong, the ALJ concluded on page 13 that the parents had not provided a proper private placement for their child. For example, on page 13, the ALJ concluded that the parents had not provided an autistic classroom for the child, nor had they provided the related services of speech, language, and physical therapy. Therefore, on page 13, the ALJ concluded that the parents were not entitled to reimbursement for the expenses that they had incurred (beginning on page 7, the list of expenses included: mortgage, insurance, utilities, phone, cable, taxes, food, and supplies, as well as payments to different service providers whose exact services or credentials were not sufficiently established during the hearing, i.e., a "teacher," an occupational therapist, a personal trainer, etc.).

Orange County

The ALJ determined that an autistic child did not need additional ESY services during the 39-day break between the conclusion of the ESY program and the beginning of the new school year in C.C. v. Orange County School Board, DOAH Case No. 99-1976E (ALJ Clark, June 14, 1999). On pages 4-5, the ALJ focused on the detailed progress charts that the school's staff had maintained for the child, which reflected that the child had "quickly recaptured within a week or so after school started" those particular skills which had "declined slightly over the summer and Christmas breaks." Also, on those pages, the ALJ noted that some skills had "stayed the same or improved somewhat over the breaks." Thus, as discussed on those pages, even though the school staff "candidly admit[ted]" that the child would "likely... regress somewhat during the July break" and would "lose some skills," the ALJ found sufficient evidence to support the staff's prediction that "the period of recoupment" would be "very brief before he moves on to master new skills."

Palm Beach County

The ALJ determined that the parent was not entitled to reimbursement for a private reading tutor for the summer months in Z.G. v. Palm Beach County School Board, DOAH Case No. 00-2091E (ALJ Kirkland, June 28, 2000). On pages 6-7, the ALJ focused on the IEP Team's later meeting in May of the subject school year, during which the IEP Team had reconsidered its initial determination that ESY was not necessary, and had developed a revised IEP for the child which focused on an ESY program designed to increase his reading skills via direct specialized instruction from an ESE teacher in the school classroom on a daily basis. On those same pages, the ALJ focused on the IEP Team's conclusions that the child was eligible for ESY due to his failure to meet his annual objectives and goals; and, because the child's skills could regress over the summer. On pages 13-14, the ALJ concluded that the IEP was designed to confer the requisite level of benefits for FAPE, based on the appropriateness of the IEP Team's determination that the child needed the ESY program due to his failure to achieve the IEP's goals and objectives; and "that he would not retain the knowledge that he had gained" without the additional instruction through the ESY program. On those same pages, the ALJ focused on the inappropriateness of a parent "attempting to compel the School Board to pay for a specific tutor to provide unspecified tutoring in reading outside the school setting," particularly here, where the "School Board can provide adequate reading instruction on an individual and individualized basis for [the child] during the ESY..."

Duval County

The ALJ concluded on pages 29-31 of J.J.A. v. School Board of Duval County, DOAH Case No. 99-3960E (ALJ Dean, August 21, 2000) that the IEP Team had offered the appropriate ESY services to the child; therefore, no compensatory educational services were required. The ALJ examined the decision-making process, the credentials of the staff involved, and the specific goals developed for the child. As to the initial determination, the ALJ stated that the IEP Team focused on whether the child was "making adequate progress" and "whether the child needs additional instruction to benefit from the education." Based on that general test, the ALJ found that the IEP Team had properly concluded that the child did need 90 minutes per day of individualized reading instruction to achieve his reading goals and objectives. The ALJ focused on the child's perfect attendance and documented progress during the ESY program. Also, the ALJ agreed with the IEP Team's determination that the child did not need math services, as he had "demonstrated educational benefit from his math instruction...[and had] made adequate progress." The ALJ concluded that this determination was "reasonable in light of generally accepted educational standards" and that the child, "did not require remediation in math during the summer to benefit from his education in math." The ALJ focused on the child's successful performance in math during the regular school year when he had attended school and had made an effort to participate, as reflected by his passing grades and a documented summary of his progression.

U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)

NOTICE

Reproduction Basis

[X] This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.

[ ] This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").